IN THE

SUPREME COURT OF THE UNITED STATES

No. A-950

HAROLD D. STIVERS — Petitioner

versus

KENTUCKY STATE BAR ASSOCIATION — Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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IN THE

SUPREME COURT OF THE UNITED STATES

No. A-950

HAROLD D. STIVERS - - - - *Petitioner*

v.

KENTUCKY STATE BAR ASSOCIATION - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

The petitioner, Harold D. Stivers, asks that a writ of certiorari issue to review the judgment of the Kentucky Court of Appeals made and entered on November 19, 1971.

OPINIONS IN THE COURT BELOW

The opinion of the Kentucky Court of Appeals, reported at 475 S. W. 2d 900, appears in the Appendix hereto. The findings and recommendations of the Trial Committee that held the evidentiary hearing and the findings and recommendations of the Board of Governors, based thereon, to the Kentucky Court of Appeals, are included in the Appendix hereto.

JURISDICTION

The judgment of the Kentucky Court of Appeals was entered on November 19, 1971. A timely petition for rehearing was denied on March 3, 1972. On March 16, 1972, Associate Justice Potter Stewart of the Supreme Court of the United States, ordered that the execution and enforcement of the mandate of the Court of Appeals of Kentucky be stayed, pending the filing of a petition for a writ of certiorari in this Court within (30) days from the date of the order. It has been so timely filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I. Were certain Rules of Practice and Procedure of the Kentucky Court of Appeals for disciplining attorneys and the manner in which the disciplinary proceedings were conducted thereunder, by the Kentucky State Bar Association against petitioner, violative of the Due Process clause of the Fourteenth Amendment of the United States Constitution, as interpreted by this Court, and Kentucky Law?

A. Did the action of the Board of Governors of the Kentucky State Bar Association, in causing a Charge to be filed against Petitioner, based solely on *ex parte* and unsworn information illegally obtained, violate his right of Due Process of Law?

B. Did the admission into evidence of certain statements, alleged to have been made by Petitioner, over his objections, which were illegally obtained, violate the Due Process clause of the Fourteenth Amendment, as interpreted by this Court?

C. Was the finding of the Trial Committee, which was not predicated on the Charge, in violation of the Due Process clause, as interpreted by this Court?

D. Did the finding and recommendation of the Board of Governors, which were not predicated on the sole charge and the entire record, violate the Due Process clause and Kentucky Law?

E. Was the exclusion of petitioner and his counsel, from closed chamber deliberations of his case by the Board, while his substantial interests were being adjudicated, in the presence of members of the Bar who conducted the prosecution of the Charge, and the Trial Committee, who held the evidentiary hearing, in violation of his basic rights of Due Process of law and fundamental fairness?

II. Was the consideration of additional Charges, injected into the proceedings by Brief of the Prosecution to the Kentucky Court of Appeals, at the final adjudicatory stage, to support the finding of guilt by the Court, in violation of the Due Process clause of the Fourteenth Amend-

ment of the United States Constitution, as intrepreted by this Court?

III. Did the total failure of the Court, in its role of "Fact Finder," to accord any significance to the evidence introduced by the petitioner, at the evidentiary hearing, serve in itself to deny him the opportunity for a fair hearing on the merits of the case, as guaranteed him by the Constitutional requirements of Due Process of law?

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Amendment XIV:

". . . (N)or shall any State deprive any person of life, liberty, or property, without the due process of law; . . ."

KENTUCKY RULES OF PROCEDURE IN DISCIPLINARY CASES

RCA 3.140 (in effect September 26, 1969):

"When it comes to the attention of the Board . . . the matter shall be reported to the President, who shall cause such investigation to be made . . ."

RCA 3.140 (as amended July 2, 1971):

"Annually, the Chief Justice shall appoint . . . an Inquiry Tribunal. The Tribunal may confer at such times as may be necessary to promptly dispose of all complaints referred to it . . ."

RCA 3.180:

> "If the Board determines, by a majority vote, that a complaint should be tried, a charge shall be prepared . . ."

RCA 3.370 (as amended July 2, 1971):

> "Only the President, the President-Elect, the Vice President and the fourteen duly elected members of the Board . . . shall be eligible to be present, participate in, and vote on any disciplinary case. Any member who has participated in any phase of a disciplinary case submitted to the Board under this Rule . . . shall be disqualified and the Chief Justice shall appoint a member to consider and act on the case."

RCA 3.380:

> ". . . a concise statement of: (c) the facts which the Committee deem proven by a preponderance of the evidence, the Committee's conclusions;"

RCA 3.390:

> "Upon receipt of the report of the Trial Committee the Board . . . shall promptly consider and act upon the entire record. The Board shall decide, by a roll call vote, whether the respondent is guilty or not guilty . . . Any Order recommending to the Court that disciplinary action be taken shall be advisory."

KENTUCKY RULES OF CIVIL PROCEDURE

RCA 1.350(b):

> "Except in extraordinary cases when justice demands it, a petition for rehearing shall be limited to a consideration of the issues argued on the appeal and will be granted only when it appears that the Court has overlooked a material fact in the record, or a controlling statute or decision, or has misconceived the issues presented on the appeal, or the law applicable thereto."

STATEMENT OF THE CASE

Based on an *ex parte* and unsworn presentation of information by the Assistant Director, a paid employee of the Kentucky State Bar Association (hereinafter Association), the Board of Governors (hereinafter Board) of the Association, caused a charge to be filed by the Association against the Petitioner, on September 26, 1969. The charge is a derivative of an inquisition conducted by the Executive Committee of the Louisville Bar Association (hereinafter L B A) on August 14, 1969, concerning a letter typed on the letterhead of Petitioner. Viewed in the most favorable light this inquiry before the L B A was a summary proceeding, to which the Petitioner was directed to appear and explain the letter or have it referred to the State Bar Association. Questioning of the Petitioner commenced. He was not placed under oath and there was no court reporter present to transcribe accurately, whatever might be said. The inquiry was interrupted momentarily and Petitioner informed that he need not

make any statement in regard to the letter, if he chose not to, and that any statement that he made could possibly be used against him in any subsequent proceeding. Two members of the Board were also members of the Executive Committee of the L B A on August 14, 1969. One of these two was present at the inquiry on August 14, 1969 and on that same date the letter inquired about was sent to the Director of the Association and at the direction of the Board the Charge was subsequently filed on September 26, 1969. Said Charge alleged that "on or about June 5, 1969, Respondent knowingly caused to be written and mailed a letter to Mrs. Mary L. Vertrees . . . for the purpose of solicitation, in direct violation of Canon 27 of the American Bar Association's Canons of Professional Ethics."

An Answer to the Charge, the only responsive pleading permitted, was timely filed, which denied the Charge and raised the affirmative defense that the Charge did not constitute a proper ground for disciplinary action, under existing Kentucky law. The President of the Association, who signed the Charge, at the direction of the Board, of which he was a member, then appointed a Trial Committee of three members of the House of Delegates of the Association, to hold an evidentiary hearing on the Charge and to file a written report thereon, with the Board. The Board delegated responsibility for prosecution of the Charge to its employees, the Director and Assistant Director of the Association, who, in turn, associated the Com-

monwealth's Attorney of Daviess County, Kentucky, to assist in the prosecution of Petitioner.

The Kentucky Court of Appeals, by Order dated January 8, 1970 approved the appointment of the Trial Committee and empowered the Chairman thereof to try the issues, with powers of a "Circuit Judge." On June 1, 1970, an evidentiary hearing was held and the prosecution was conducted by the Commonwealth's Attorney, acting as Chief Prosecutor, aided by the Director and Assistant Director of the Association. Testimony of a witness regarding his recollection of statements allegedly made by Petitioner at the August 14, 1969 inquiry before the L B A was admitted into evidence over Petitioner's objections. This appears in the Transcript of Evidence of the Trial Committee hearing (T.E. 27-39). Objections to this testimony were renewed after this hearing, in Petitioner's Brief to the Trial Committee (Br. T.C. 5-8). Petitioner further asserted that all of the evidence admitted at the evidentiary hearing, was not sufficient to substantiate the Charge (Br. T.C. 1-7). The affirmative defense that the Charge did not constitute a proper ground for disciplinary action, in the face of existing Kentucky law, was renewed (Br. T.C. 7-12).

On March 10, 1971, more than nine months after the Trial Committee conducted its hearing on the Charge, it gave birth to "Findings and Recommendations of Trial Committee" and filed this with the Board. Petitioner was found guilty and punishment of a public reprimand recommended to the Board. Immediately thereafter at its regular scheduled meet-

ing on March 19, 1971, the Board once again took under consideration the Charge against Petitioner. Present at this deliberation of the Charge against the Petitioner, in addition to the full Board, who directed the initial filing of the Charge by a member, the President of the Association, were the three members of the Trial Committee, including the Chairman, who had been empowered by an Order of the Court dated January 8, 1970, to try the issues, with powers of a "Circuit Judge," the Director, Assistant Director and General Counsel of the Association, the last three being paid employees of the Association and hence, the Board. They were responsible for implementation and prosecution of the Charge filed by the President of the Association and member of the Board, that considered and evaluated information about the Petitioner, in the first instance. This closed chamber proceeding excluded the accused and his counsel. There came forth, a Finding of guilt and a Recommendation that punishment of Petitioner be increased from a public reprimand to a three year suspension from the practice of law, a devastating increase in the punishment. This Finding and Recommendation was filed with the Court. On March 30, 1971, the Court issued a rule, based on the Finding and Recommendation of the Board, directing Petitioner to show cause why such Finding and Recommendation of a three year suspension of the Petitioner from the practice of law should not be enforced by Order of the Court. A timely Response with Supporting Brief (Br. C.A.) was filed with the Court on May 14, 1971, wherein Petitioner

timely, properly and pointedly presented to the Court, every substantive and procedural question pertaining to the initial hearing by the Board, the Trial Committee evidentiary hearing and the final hearing of the Board which Petitioner contends deprived him of due process of law as guaranteed to him by the Constitution of the United States. Objections were renewed as to the manner evidence (so called) was obtained by the Board and admitted at the evidentiary hearing before the Trial Committee (Br. C.A. 10-13, 20, 24). The finding of guilt by the Trial Committee was objected to as not being predicated on the sole Charge filed against Petitioner (Br. C.A. 3-6). Petitioner objected to the finding of guilt, by the Trial Committee, on the initial Charge, as being contrary to existing Kentucky law (Br. C.A. 13-19). The Finding and Recommendation of the Board were objected to as not being predicated on the Charge, the NINETY-NINE (99) page Transcript of the evidentiary hearing held before the Trial Committee filed with the Board (Br. C.A. 21-23). A crucial issue was raised as to the exclusion of Petitioner and his counsel from closed chamber deliberations of the Board, which were conducted in the presence of the Trial Committee and members of the Association, who were paid employees of the Association, and hence, the Board, who were charged with prosecution of Petitioner and who were therefore his adversaries (Br. C.A. 20-27). Petitioner contended that the Trial Committee failed to file a complete report, containing a concise statement of facts deemed proven by a preponderance of evidence and

proper conclusions of law, to support its finding of guilt of the Charge (Br. C.A. 3-6). Petitioner earnestly contended that to subject him to Disciplinary Sanctions on the Charge, even if proven by a preponderance of the evidence, would convict him, without notice, that the act with which he was charged would constitute a a punishable offense under existing Kentucky law (Br. C.A. 13-19).

Subsequent to the filing, with the Court, on May 14, 1971, of Petitioner's Response with Supporting Brief, but prior to filing, with the Court on September 28, 1971, of the opposing Brief of General Counsel of the Association, and prior to final adjudication of the Charge, by opinion of the Court, delivered November 19, 1971, certain amendments to the rules of the Court, pertaining to Bar disciplinary cases, were made effective by Order of the Court, entered July 2, 1971. These amendments eliminated, almost in their entirety, those provisions that the Petitioner had argued in his Brief were objectionable, as being violative of his Fourteenth Amendment rights of procedural due process and fundamental fairness.

General Counsel for the Association filed its opposing Brief two (2) months and twenty-four (24) days after the Court amended its rules. The amendments make the Court's rules conform, NOW, to the standard Petitioner claimed was necessary, in his case, to afford him Constitutional guarantees of due process of law. Yet, the hired General Counsel of the Association devoted fifteen (15) pages, or approximately one-half (½) of his thirty-two (32) page Brief (pp. 11-26),

to an exhaustive argument that "The Disciplinary Proceedings by the Kentucky State Bar Association were not Conducted in Such a Way as to Deny the Respondent (Petitioner herein) any Constitutionally Guaranteed Rights." To add to this obvious enigma, the Association's Counsel used eight (8) more pages of his opposing Brief (pp. 3-11), to inject and add new Charges against the Petitioner. Under the rules of the Court, Petitioner had no means to respond to these new Charges, prior to an adjudication of the case on the merits, by the Court or in a Petition for Rehearing after the adjudication (RCA 1.350). The Charges added are, "Stirring up strife and litigation . . ." (pp. 4, 5, 6, 7, 8, 9, 10), "Ambulance chasing" (p. 5) and "to obtain employment through the use of employed agents or 'runners' . . ." (p. 7). The Association's Counsel meticulously TESTIFIES, that "his letters were obviously intended, not only to stir up strife and litigation, but to insure that he would be hired as the attorney to represent the injured party in such a law suit" (p. 5, para. 1).

The Opinion of the Court of November 19, 1971, which adjudged the Petitioner guilty and suspended him from the practice of law for one (1) year, speaks for itself. A Petition for Rehearing was timely filed in the Court below. Under the rules of the Court, a rehearing will be granted only when a material fact, controlling statute or decision has been overlooked, or when the issues of law have been misconceived (RCA 1.350). The Petition is limited to presentation of new material. *Grigsby* v. *Barr,* 77 Ky. (14 Bush) 330

(1878). In the Petition for Rehearing (P.R.), Petitioner urged that the Opinion of the Court neither answered nor recognized the serious challenge raised by his Brief, that the deliberative process of the Board, and hence, its recommendation to the Court, was tainted by the Board's previous exposure to *ex parte* allegations against Petitioner, upon which the Board itself directed that the Charge be filed (P.R. 1). Petitioner objected to the total failure of the Court to accord any significance to the evidence introduced by him at the evidentiary hearing (P.R. 2). Petitioner further objected to the judicial philosophy of the Court, under which it tacitly recognized the validity of his arguments by amendments to its own rules, while subsequently refusing to apply or even acknowledge the same principles properly raised by Petitioner (P.R. 1, 2, 4). The Court below denied the Petition for Rehearing and Petitioner's Motion for a Stay of the Execution and Enforcement of the Mandate, pending application to this Court for Review of Certiorari, on March 3, 1972. A Motion for a Stay Pending Review of Certiorari, filed in this Court on March 9, 1972 was granted on March 16, 1972, pending the filing of this petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I

Certain Rules of Practice and Procedure of the Kentucky Court of Appeals for Disciplining Attorneys and the Manner in Which the Disciplinary Proceedings Were Conducted Thereunder By the Kentucky State Bar Association Against the Petitioner Are Violative of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States and Kentucky Law.

SUMMARY OF THIS REASON

Bar disciplinary proceedings in Kentucky are conducted pursuant to rules promulgated by the Kentucky Court of Appeals. In 1969, the rules in effect (RCA 3.010, *et seq.*) were adopted on June 27, 1963. Subsequently, this Court declared bar disciplinary proceedings to be quasi-criminal in nature. *Spevack* v. *Klein*, 385 U. S. 511 (1967). This Court's decision, in *In re Ruffalo*, 390 U. S. 544 (1968) held that disciplinary proceedings against an attorney are adversary and quasi-criminal in nature, and that the accused attorney is entitled to the constitutional guarantees of procedural due process of law. Further, this Court has recognized that due process requires an investigatory body to afford the person under investigation the right to confront and examine the witnesses against him, if that body has authority to make specific findings of guilt. *Jenkins* v. *McKeithen*, 395 U. S. 411 (1969). The Board of Governors of the Kentucky State Bar Association caused a Charge to be filed, based solely on

ex parte and unsworn information, obtained illegally and in violation of the due process clause. Certain statements alleged to have been made by the Petitioner and which were illegally obtained were admitted into evidence, over his objections in violation of the due process clause. The finding of guilt by the Trial Committee was not predicated on the sole Charge and is violative of due process. The finding was also contrary to Kentucky law (RCA 3.380). The Finding and Recommendation of the Board were not predicated on the sole Charge and the ENTIRE RECORD, in violation of the due process clause and Kentucky law (RCA 3.390). The exclusion of Petitioner and his Counsel from closed chamber deliberations of his case by the Board, conducted in the presence of members of the Bar Association who conducted the prosecution of the Charge against Petitioner and the Trial Committee who conducted the evidentiary hearing, while his substantial interests were being adjudicated, was violative of his most basic and fundamental rights of due process and fundamental fairness as guaranteed him by the Fourteenth amendment.

A. The Board of Governors of the Kentucky State Bar Association Caused a Charge to be Filed Against Petitioner Based Solely on Ex Parte and Unsworn Information Illegally Obtained in Violation of His Right of Due Process of Law.

When the Board caused a Charge to be filed against Petitioner, it was authorized as agent of the Court not only to make investigations of complaints against attorneys but also to cause charges to be filed and to make

specific findings of guilt or innocence. Petitioner's Brief (pp. 24-25) to the Court and Petition for Rehearing (p. 1) raised objections to the propriety of this procedure, which the Court did not answer or acknowledge. RCA 3.140 provides in part:

> "When it comes to the attention of the Board . . . the matter shall be reported to the President, who shall cause such investigation to be made. . . ."

RCA 3.180 provides in part:

> "If the Board determines, by a majority vote, that a complaint should be tried, a charge shall be prepared. . . ."

RCA 3.390 provides in part:

> "Upon receipt of the report of the Trial Committee the Board . . . shall promtly consider and act upon the entire record. The Board shall decide, by a roll call vote, whether the respondent is guilty or not guilty. . . . Any Order recommending to the Court that disciplinary action be taken shall be advisory."

It is clear from the above that due process required that Petitioner should have been afforded the right to confront and cross-examine the witnesses against him at the Board hearing which authorized the Charge to be filed. *Jenkins* v. *McKeithen, supra.* He was denied that right. The Prosecution places great emphasis on the fact that all functions of the Court's agents are "advisory." However, it is significant that on July 2, 1971, the Court's rules were amended and the functions of the Board of instituting investigations and filing of

charges were removed. Presently RCA 3.140 provides in part:

> "Annually, the Chief Justice shall appoint . . . an Inquiry Tribunal. The Tribunal may confer at such times as may be necessary to promptly dispose of all complaints referred to it. . . ."

The Court tacitly recognized the validity of Petitioner's objections, by amending its rules on July 2, 1971, but rejected them by its Opinion of November 19, 1971.

B. Certain Statements Alleged to Have Been Made by Petitioner Which Were Illegally Obtained Were Admitted Into Evidence Over His Objections, in Violation of the Due Process Clause of the Fourteenth Amendment.

The *only evidence* introduced by the Prosecution, at the evidentiary hearing, to substantiate the Charge consisted of vague recollections of a witness to statements allegedly drawn from the lips of the accused at a meeting of the Executive Committee of the Louisville Bar Association, before which Petitioner had been summarily directed to appear. The circumstances under which the so-called evidence was obtained are distressingly similar to those found constitutionally offensive by this Court in *In re Ruffalo, supra.* These alleged statements were made when the accused was admittedly upset, chagrined and indignant; when he was not under oath; and when, regrettably, no court reporter was present to transcribe accurately and in what context, the words that were actually spoken at that inquiry.

This witness for the prosecution testified specifically as follows (T.E. 34-35):

> "Mr. Stivers did state that he was aware of the letter, he stated that he had prepared it, it did go out of his office *before* he had decided to send it."

While the above statement clearly favors the Petitioner (accused), the witness, on cross-examination testified that Stivers made the statement that the letter had been prepared in his office and he therefore assumed responsibility for it as it came out of his office (T.E. 37-38). Next, the witness testified that, *somehow,* "it became clear," to the witness that Stivers had prepared the letter (T.E. 38). These statements are obviously inconsistent. At best the testimony of the witness constitute *Findings of Fact* rather than relations of admissions against interest. These subjective "findings" of the witness were inadmissible as probative evidence under any criteria and were illegally obtained in violation of Petitioner's rights of due process as set forth by this Court in *In re Ruffalo, supra.*

C. The Finding of the Trial Committee Which Was Not Predicated on the Charge is in Violation of the Due Process Clause, as Interpretated by This Court.

The finding of the Trial Committee, set forth in the Appendix hereto states:

> "The Committee finds that the actions of Harold D. Stivers in writing the letter to Mary Vertrees, or even permitting and condoning it to be sent over

his signature, constitutes unethical conduct. The Committee believes that such conduct warrants disciplinary action."

This indecisive language makes it impossible to ascertain what the Committee determined was established by a preponderance of the evidence. This is conceded in the Opinion (p. 4) (App. 33, par. 1) of the Court. The rules of the Court require in RCA 3.380 ". . . a concise statement of: (c) the facts which the Committee deem proven by a preponderance of the evidence, the Committee's conclusions;" Clearly, the Committee did not find that Petitioner committed the specific act with which he was charged. Nor did the Court, in its Opinion. At most, the Committee and the Court found that Petitioner did one of three things and not the specific allegation of the Charge, upon which, if proven and if it merits disciplinary action *must* be the basis of which the finding of guilt is predicated. Out of the fog, one conclusion becomes painfully clear, *i. e.,* whatever happened, the Petitioner did it and he should be disciplined for it. It is submitted, that making an example of the Petitioner, as has been done by the Opinion of the Court, which appears in the Official Reported decisions, benefits neither the public nor the profession. The wrong is done. Granting Petitioner due process, denied below, can only serve to vindicate the profession as a whole. The Court below has shown utter disregard of the requirements set forth by this Court in *In re Ruffalo, supra.*

D. The Finding and Recommendation of the Board of Governors Were Not Predicafed on the Sole Charge and the Entire Record in Violation of the Due Process Clause and Kentucky Law.

The minutes of the regular meeting of the Board of March 19, 1971 recite that the case of Petitioner was called, the Trial Committee's report was submitted and ordered filed, and the matter "fully considered" whereupon the Board found Petitioner guilty and ordered his suspension from the practice of law for three years. Under the Court's rules, RCA 3.390, *supra,* the Board was required to consider and act upon the entire record. The minutes DO NOT recite that the ninety-nine page transcript of the evidence taken at the Trial Committee hearing was read and considered by each of the fifteen members of the Board. Yet the recommendation of the Trial Committee that a public reprimand was sufficient under the facts determined by the Committee was ignored and the penalty devastatingly increased by the Board to a three year suspension from the practice of law. Was this action the result of each Board member's reading and consideration of the Trial Committee's report? Surely, if the Board had considered the recommendation of the Committee as to the punishment to be so flagrantly disproportionate, it would not have been routinely filed, without comment. In any event, whether the Board's finding was based on that of the Trial Committee or something extrinsic, it deprived the Petitioner of notice of the true nature of the Charge against him, thus due process of law, as did that of the Trial Committee. *In re Ruffalo, supra.*

E. The Exclusion of Petitioner and His Counsel From Closed Chamber Deliberations of His Case by the Board, While His Substantial Interests Were Being Adjudicated, in the Presence of Members of the Bar Who Conducted the Prosecution of the Charge and the Trial Committee, Who Held the Evidentiary Hearing Was in Violation of His Basic Rights of Due Process of Law and Fundamental Fairness.

The presence of those who prosecuted the Petitioner, during the Board's deliberations, while Petitioner and his counsel were excluded is intolerable under our system of jurisprudence and undeniably offensive to the constitutional guarantees of due process of law. The Opinion (pp. 7-8) (App. 36, par. 3) of the Court below agreed and stated, "We concede that no person who has participated in the investigation, prosecution, or hearing before the trial committee should be present in the deliberate process of the Board of Governors. To the extent that their presence is permitted, any final action of the Board will necessarily be STIGMATIZED." Petitioner's Brief (pp. 20-27) attacked this procedure. It was filed with the Court May 14, 1971. The amended rules of the Court, promulgated July 2, 1971, expressly prohibited the practice. RCA 3.370 provides in part:

> "Any member who has participated *in any phase* of a disciplinary case submitted to the Board under this Rule . . . shall be *disqualified* and the Chief Justice shall appoint a member to consider and act on the case." (Emphasis supplied.)

As to the presence of those who conducted the investigation and prosecution of Petitioner, once again,

the amended rules of the Court expressly prohibit this practice. RCA 3.370 provides in part:

> "*Only* the President, the President-Elect, the Vice President and the fourteen duly elected members of the Board . . . shall be *eligible to be present,* participate in, and vote on any disciplinary case." (Emphasis supplied.)

In his Petition for Rehearing (p. 1), it was urged that Petitioner could not understand the judicial philosophy by which the Court could tacitly recognize the validity of his argument by its amendment to its rules, yet subsequently refuse to apply or even acknowledge the same principle properly raised by Petitioner. The Court dismissed the significance of this *STIGMA as it applied to Petitioner's case* on the basis that the Board's role was "little more than hortatory." It would be cavalier to assert that the Court's judgment is not influenced by the recommendations of bodies (agents) established under its own rules, and the great majority of reported cases, where the Board's recommendations are generally followed by the Court, do not bear out this assertion. Clearly there has been an unconstitutional mixing of functions and any purported separation was mere window dressing. True, the Board supposedly relied on a report of the Trial Committee, the trier of fact. Nonetheless it retained control over the fate of Petitioner from the moment it heard unsworn evidence against him and directed a Charge to be filed, to the moment it sent a recommendation to the Court that he be suspended from the practice

of law for three years. The appearance of a fair hearing becomes illusionary, when Petitioner and his counsel are excluded at the final and most vital stage in his case, while the prosecution is present.

Thus, stripped of artifice, in the final analysis the Board acted as Grand Jury, Jury and Judge in the prosecution of Petitioner.

II

The Consideration of Additional Charges Injected Into the Proceedings By the Brief of the Prosecution to the Kentucky Court of Appeals At the Final Adjudicatory Stage to Support the Finding of Guilt By the Court Is in Violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution as Interpreted By This Court.

This case ultimately reached the Kentucky Court of Appeals by a circuitous route, heretofore outlined in detail. Petitioner was prosecuted on a single Charge that he "knowingly caused to be written and mailed a letter to . . . for the purpose of solicitation . . . in violation of Canon 27 . . ." At this final adjudicatory stage, the Prosecution made an unprecedented maneuver. A Response to the rule issued against the Court was timely filed, with a Supporting Brief as permitted. The Prosecution then timely filed an opposing Brief, as permitted. The Prosecution's Brief can only be charitably characterized as "opposing" and only a complete reading of the entire contents can accurately reveal how far beyond the bounds of propriety it pervades. Totally new and additional charges were not

only asserted by the Prosecution, but allegations of facts (testimony) calculated to substantiate the new charges. Petitioner was not afforded a hearing on these new charges as there is no provision therefor at the adjudicatory stage. The case was taken under submission by the Court and the Opinion of the Court was rendered on November 19, 1971.

The Opinion (pp. 6-7) (App. 35, par. 2) held that the Kentucky cases cited and relied on by Petitioner throughout the proceedings, in support of his argument that the Charge (initial) was not proper, constituted the existing Kentucky law on September 26, 1969. In effect, this overruled the finding of the Trial Committee that these cases were mere dicta, overruled by other decisions of the Court, expressly or by implication and hence, the Board of Governors who acted thereon. It would logically follow, that since these lower tribunals (agents of the Court) had been overruled and since the Charge (initial) against Petitioner did not constitute conduct which would merit disciplinary action or sanction, under Kentucky law, that the Petitioner would stand exonerated. Nay! A foundation had been laid upon which to predicate a finding of guilt and a conviction of Petitioner, through the consideration of EXTRINSIC charges and allegations to support them. Even a cursory reading of the Prosecutions Brief (pp. 3-11) and the Court's Opinion (pp. 6-7) (App. 35, par. 2), together, leave no room for doubt that the new Charges were considered by the Court. For example, prosecution Brief, page 9, "Certainly, sending letters like the one in the case at bar would not be something done 'with impunity', es-

pecially where it was designed to stir up strife and litigation". The Court's Opinion, page 7 (App. 35, par. 3), "The plain purpose of the respondent's letter to . . . was to inform her that she probably had a cause of action and to solicit employment by her for its prosecution". The constitutional requirements of due process have been stretched beyond endurance, to achieve this result. Under these unparalleled circumstances, Petitioner has been deprived of notice of the true nature of the Charge (initial) against him and fundamental fairness, clearly denying him due process of law. As this Court has observed in regard to Bar disciplinary proceedings:

> "These are adversary proceedings of a quasi-criminal nature (Citations omitted). The Charge must be known before the proceedings commence. They become a trap when, after they are underway, the Charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh". *In re Ruffalo,* 390 U. S. 544 (1968).

Clearly, the Prosecution and the Court below and its agents have gone far beyond what this Court held was constitutionally offensive. If these proceedings go unchallenged, the judicial philosophy inherent therein, could be an almost lethal blow to fair treatment and scrupulous preservation of constitutionally guaranteed rights, in future Bar disciplinary proceedings, the very standard for which the profession should strive. The initial Charge should not have been filed. A proper interpretation of existing law, as applied to the facts,

should have resulted in a dismissal by the Committee or Board. Certainly, the Court, which properly interpreted the law, should have exculpated the Petitioner.

III

The Total Failure of the Court in Its Role of "Fact Finder" to Accord Any Significance to the Evidence Introduced By Petitioner At the Evidentiary Hearing Serves in Itself to Deny Him the Opportunity for a Fair Hearing On the Merits of the Case as Guaranteed Him By the Constitutional Requirements of Due Process of Law.

The manner in which the Court dealt with the evidence introduced by Petitioner is set forth in the Opinion (pp. 4-5) (App. 33, par. 1). The Court first indulges itself in *implications* that Petitioner "did one of three things—either he wrote the letter and had it sent, or he consciously permitted it to be written and sent, or he condoned it in the sense that he purposely gave his secretary reason to believe it would be desirable or permissible for her to write and send letters of this kind". From these three *implications*, the Court concludes (p. 5) (App. 33, par. 1), "In any of these circumstances it could be fairly said that he (Petitioner) 'knowingly'-caused the letter to be prepared and sent". Apparently, the Court decided that its conclusion required further justification, as an *inference* of knowledge was placed on Petitioner, since the letter was on his letterhead. The Court summarily dismissed the unequivocal testimony of Petitioner and his secretary (Transcript Evidence pp. 55, 71) that he neither

typed, signed nor mailed the letter nor directed that the letter be typed, signed and mailed. Finally, the Court, the Appellate Court of last resort, "saddled" itself with the role of "fact finder", and thus completely removed from the presence of the witnesses, with no opportunity to observe their demeanor, sincerity and credibility, concluded, "So, without beating about the bush we now find *the charge* to have been sustained by the evidence produced before the trial committee—that is to say, the evidence persuades us that the respondent (Petitioner) either deliberately caused the letter to be sent or else had enough to do with it to be chargeable with knowledge that it would be done".

The foregoing is a futile attempt to correct the equivocal and indecisive finding of the Trial Committee that Petitioner was guilty of the Charge about which it heard evidence. The Court concedes (p. 4) (App. 33, par. 1), "Undoubtedly the finding was not as direct as it could have been". Petitioner urges that there was no unequivocal or decisive finding at all, by the Committee or the Court. Assuming that there was a decisive finding by the Committee and the Court, on the Charge (initial), the Court's Opinion of guilt is bottomed on Extrinsic Charges, and not on the only Charge properly before the Court. This is fully explained in Reason II. This is an adversary proceeding of a quasi-criminal nature. *In re Ruffalo.* That there is a vast distinction in criminal law between thought and deed needs hardly to be stated. Petitioner is charged with "knowingly" committing a deliberate

act. Nothing more. There is not a shred of evidence in the record to establish that he knowingly committed the deliberate act. The only evidence is to the contrary. This was ignored by the Court. There has been an abortive attempt to supply the fundamental missing element of a volitional act or deliberative omission by finding Petitioner guilty of a pervasive and undefined notion of misconduct arising from some supposed misdeed or dereliction, *other than the specific act alleged in the Charge*. The Court below should have dismissed the Charge, based on the foregoing alone. Its failure to do so, by excluding Petitioner's evidence, clearly denied him due process of law.

CONCLUSION

As petitioner was denied due process of law, by the manner in which the Kentucky State Bar Association conducted the proceedings against him, which was tacitly recognized by the Kentucky Court of Appeals' subsequent amendments to its own rules and as the decision of the Kentucky Court of Appeals is violative of both substantive and procedural due process of law, in affirming what petitioner contended was existing substantive law and subsequently amending its procedural rules, while finding petitioner guilty on extrinsic charges, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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